

1993

N. H. Hansen v. Wayne Parker : Brief of Appellant

Utah Court of Appeals

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Robert W. Hughes.

Frederick N. Green; Julie V. Lund; Green and Berry; Attorneys for Plaintiff.

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UTAH COURT OF APPEALS
BRIEF

GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

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IN THE UTAH COURT OF APPEALS

N. H. HANSEN,

Plaintiff/Respondent,

vs.

WAYNE PARKER,

Defendant/Appellant.

BRIEF OF THE APPELLANT

Docket No. 

93-0451-3

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Timothy R. Hansen

Argument Priority Classification 15

FREDERICK N. GREEN
JULIE V. LUND
GREEN & BERRY
Attorneys for Plaintiff
10 Exchange Place
622 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

ROBERT W. HUGHES
7050 South Union Park Avenue, #420
Midvale, Utah 84047

FILED

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COURT OF APPEALS

GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

IN THE UTAH COURT OF APPEALS

N. H. HANSEN,

Plaintiff/Respondent,

vs.

WAYNE PARKER,

Defendant/Appellant.

BRIEF OF THE APPELLANT

Docket No. 930138

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Timothy R. Hansen

Argument Priority Classification 15

FREDERICK N. GREEN
JULIE V. LUND
GREEN & BERRY
Attorneys for Plaintiff
10 Exchange Place
622 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

ROBERT W. HUGHES
7050 South Union Park Avenue, #420
Midvale, Utah 84047

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GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

IN THE UTAH COURT OF APPEALS

N. H. HANSEN,

Plaintiff/Respondent,

vs.

WAYNE PARKER,

Defendant/Appellant.

BRIEF OF THE APPELLANT

Docket No. 930138

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this matter pursuant to §78-2-2 (4) and the Order of the Supreme Court dated July 14, 1993.

STATEMENT OF THE ISSUES

1. Did the District Court err in refusing to consider parole evidence concerning the circumstances surrounding the execution of the Promissory Note?

2. Did the District Court err in awarding the Plaintiff summary judgment where fraud was raised as an affirmative defense by Parker?

3. Did the District Court err in awarding the Plaintiff summary judgment where there were questions of material fact regarding representations made to Parker concerning the condition and value of the consideration for the Promissory Note being sued upon?

DETERMINATIVE LAWS OR STATUTES

None.

STATEMENT OF THE CASE

A. Nature of the Case

This case was an action filed to collect amounts allegedly owing under a Promissory Note dated December 20, 1986. Parker executed the note in favor of Hansen in consideration for a deisel tractor truck which Hansen represented to be "roadworthy", having recently had its engine rebuilt.

In fact, the truck needed substantial and costly repairs and it was subsequently discovered that it had a large hole in its engine block which had been concealed with paint. Parker would not have agreed to pay the amount agreed upon by the parties had he known of the true condition of the truck.

B. Course of Proceedings

Plaintiff Hansen filed a Motion for Summary Judgment which was heard by Judge Timothy R. Hanson on August 17, 1992. Judge Hansen ruled from the bench that there was no dispute that Parker had signed the Note and that the money claimed was due and owing under the Note. He ruled in favor of the Plaintiff and signed a judgment consistent with that ruling on February 22, 1993.

C. Disposition at Trial Court

Plaintiff Hansen was awarded summary judgment on February 22, 1993.

RELEVANT FACTS

1. In the fall of 1986, Parker was contacted by a co-worker (the son-in-law of the Plaintiff) regarding the purchase of a tractor trailer from his father-in-law who resided in Tennessee. (Affidavit of Wayner Parker ¶ 3)

2. Parker discussed the condition of the vehicle with Hansen who represented to him that the vehicle was "roadworthy" and that he had just had its engine rebuilt as well as other major repair work. (Affidavit of Wayne Parker ¶ 5)

3. Based upon these representations Parker decided to purchase the vehicle and sent two drivers to Tennessee to return with the tractor trailer. (Affidavit of Wayne Parker ¶ 7)

4. On or about the 20th day of December, 1986, Defendant executed and delivered to the Plaintiff a Promissory Note (the "Note"), which provided that the Defendant, for value received, promised to pay to the Plaintiff, the amount of \$12,700.00. The Note provided that it would be paid at the rate of \$1,000.00 per month, beginning January 1, 1987, until the principal and accrued interest were paid in full. (Determinations of Fact and Basis for Granting Summary Judgment (hereafter "Determinations") ¶ 1)

5. The Defendant made payments to the Plaintiff as follows:

January 1, 1987	\$1,000.00
March 10, 1987	1,000.00
April 13, 1987	252.00
May 1, 1987	1,000.00
July 21, 1987	240.00

May 1, 1988	1,000.00
November 19, 1988	1,500.00
March 14, 1989	1,500.00
July 15, 1989	1,000.00

(Determinations ¶ 2)

6. Shortly after taking possession of the truck, Parker discovered that the truck needed substantial repairs and that it had a large hole in its engine block which had been patched and painted over to conceal it. (Affidavit of Wayne Parker ¶¶ 8 & 10)

7. As a direct result of the defective condition of the truck, Parker spent over \$18,000.00 in repairing the truck during the first six months he owned it and suffered other consequential damages related to loss of income from the truck and a penalty incurred when the truck broke down carrying a load of merchandise. (Affidavit of Wayne Parker ¶ 10)

8. Parker eventually sold the truck for \$3,500.00 and paid that amount over to Hansen. (Affidavit of Parker ¶ 11)

9. Hansen brought suit for the amounts which remained owing under the Note. (Complaint)

10. Parker counterclaimed for the damages he incurred as a result of the fraudulent representation made by Hansen and raised fraud as an affirmative defense in his Answer. (Amended Answer and Counterclaim)

11. The Counterclaim was dismissed on the basis that it was barred by the statute of limitations. (Determinations ¶ 6)

SUMMARY OF THE ARGUMENT

Parker appeals on the basis that his affirmative defense of fraud and the Affidavit he submitted in opposition to Plaintiff's

Motion for Summary Judgment fell within the exception to the parole evidence rule and raised issues of material fact which precluded an award of summary judgment in favor of the Plaintiff.

ARGUMENT

I. THERE IS AN EXCEPTION TO THE PAROL EVIDENCE RULE FOR FRAUD.

Summary judgment was granted in this case based upon a finding that the Promissory Note was clear and unambiguous on its face and that it "did not refer to any collateral or security or the happening of any future event." (Determinations ¶ 8) There was no consideration given to the issue of fraud raised in Parker's affidavit and his Amended Answer.

The issue raised by this appeal was addressed in a decision rendered by the Utah Supreme Court in Union Bank v. Swenson, 707 P.2d 663 (Utah 1985). In that case, the Appellants had executed a promissory note in favor of Union Bank "individually and personally". Appellant Ronald Swenson also signed the note as president of State Lumber, Inc. Subsequently, there was a default on the note and Union Bank sued State Lumber and the Swensons personally, to recover on the note.

Union Bank moved for summary judgment on the basis that the note was an integrated writing and the parole evidence rule should be applied. The Swensons responded by amending their Answer to include an affirmative defense that they had not intended to personally guarantee the note. They alleged that the bank representatives had assured them that their signatures were for appearances only and that there would be no effort to collect on

the note against them personally. These allegations were supported in affidavits filed by the Swensons in opposition to the bank's motion for summary judgment.

The trial court applied the parol evidence rule and granted summary judgment in favor of the bank. The Swensons argued on appeal that their affirmative defense of fraud raised an exception to the parol evidence rule and the Utah Supreme Court agreed.

The parol evidence rule as a principle of contract interpretation has a very narrow application. Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract. Eie v. St. Benedict's Hospital, 638 P.2d 1190, 1192, (Utah 1981); Bullfrog Marina, Inc. v. Lentz, 28 Utah.2d 261, 266, 501 P.2d 266, 270 (1972); Corbin, The Parole Evidence Rule, 53 Yale L.J. 603, 609 (1944). Therefore, a court must first determine whether the writing was intended by the parties to be an integration. In resolving this preliminary question of fact, parol evidence, indeed any relevant evidence, is admissible. Eie v. St. Benedict's Hospital, 638 P.2d at 1194.

This general rule as stated contains an exception for fraud. Parol evidence is admissible to show the circumstances under which the contract was made or the purpose for which the writing was executed. This is so even after the writing is determined to be an integrated contract. Admitting parol evidence in such circumstances avoids the judicial enforcement of a writing that appears to be a binding integration but in fact is not.

Union Bank v. Swenson, 707 P.2d at 665. (Emphasis added.)

In the present case, the Promissory Note appears to be a fully integrated document but it is not. The Note was executed as payment for a truck, the condition and value of which was misrepresented to the purchaser. The circumstances surrounding the execution of the Promissory Note were presented to the court in the Affidavit of Wayne Parker which was filed in opposition to

Plaintiff's Motion for Summary Judgment. In his Affidavit, Mr. Parker clearly states that he would not have signed the Note for \$12,700.00 had he known of the defective condition of the truck's engine.

Mr. Parker's testimony is evidence of a contemporaneous agreement regarding the consideration for the Promissory Note. He agreed to pay a certain amount for a truck which he believed was roadworthy and in good condition. He received a vehicle that had a hole in the engine which had been patched and painted over in an effort to conceal it. This testimony was improperly disregarded by the trial court and summary judgment was awarded to the Plaintiff.

Based upon the decision in Union Bank v. Swenson, Parker's affidavit testimony should have been considered as it falls within the exception to the parol evidence rule.

II. PARKER'S TESTIMONY RAISED GENUINE ISSUES OF MATERIAL FACT WHICH SHOULD HAVE PRECLUDED THE AWARD OF SUMMARY JUDGMENT.

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment is appropriate in cases where there is no genuine issue as to the material facts and the moving party is entitled to judgment as a matter of law. In this case, there was testimony by Parker which raised issues of material fact concerning the consideration given for the promissory note.

Parker testified about certain representations made by Hansen regarding the condition of the tractor trailer and the work that had been performed upon it. It was also his testimony that he

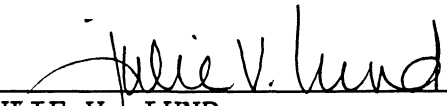
relied upon those representations in making his decision to purchase the vehicle and the determining the value of the vehicle. Parker's affidavit raises issues of fact regarding the sufficiency of the consideration for the Promissory Note and the circumstances under which it was executed. These facts, had they been considered, should have precluded summary judgment in favor of the Plaintiff.

CONCLUSION

Appellant Wayne Parker asks that this Court reverse the District Court order granting summary judgment to Hansen and Remand this matter for a determination of the factual issues surrounding the sale of this vehicle to Mr. Parker.

DATED this 20 day of July, 1993.

GREEN & BERRY



JULIE V. LUND
Attorney for Defendant

ADDENDUM

- A. Determination of Fact and Basis for Granting Summary Judgment.
- B. Judgment
- C. Affidavit of Wayne Parker

EXHIBIT C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

N. H. HANSEN,	:	DETERMINATIONS OF FACT AND	
	:	BASIS FOR GRANTING SUMMARY	
Plaintiff,	:	JUDGMENT	
vs.	:	CASE NO. 910905500	FILED DISTRICT COURT
WAYNE PARKER,	:		Third Judicial District
Defendant.	:		FEB 22 1993

By 151 SALT LAKE COUNTY
Deputy Clerk

This action came on for hearing pursuant to plaintiff's Motion for Summary Judgment before the Court, the Honorable Timothy R. Hanson presiding. The plaintiff was represented by his counsel of record, Robert W. Hughes, and the defendant was represented by his attorney, Julie Lund, of the law firm of Green & Berry. The parties having made argument to the Court, and the Court having reviewed the pleadings and the file of this matter and being fully advised of the issues before the Court, enters its Determinations of Fact and Basis for Granting Summary Judgment.

FACTS

1. On or about the 20th day of December, 1986, defendant executed and delivered to the plaintiff a Promissory Note (the

"Note"), which provided that the defendant, for value received, promised to pay to the plaintiff, the amount of \$12,700.00. The Note provided that it would be paid at the rate of \$1,000.00 per month, beginning January 1, 1987, until the principal and accrued interest were paid in full.

2. The defendant made payments to the plaintiff as follows:

January 1, 1987	\$1,000.00
March 10, 1987	1,000.00
April 13, 1987	252.00
May 1, 1987	1,000.00
July 21, 1987	240.00
May 1, 1988	1,000.00
November 18, 1988	1,500.00
March 14, 1989	1,500.00
July 15, 1989	1,000.00

3. There remains a balance owing by the defendant to the plaintiff pursuant to the terms of the Note of \$8,844.88 as of August 21, 1992, plus interest after that date.

4. The Note provided that if it was placed in the hands of a collector or an attorney for collection, then all collection fees, attorney's fees, costs, and all other expenses would be paid by the defendant.

5. The Note was placed with an attorney for collection.

6. The defendant's Counterclaim against the plaintiff is barred by the statute of limitations and defendant's counsel stipulated to the dismissal of defendant's Counterclaim at the hearing on this matter.

GROUND'S FOR SUMMARY JUDGMENT

7. At the time the defendant executed the Note, the defendant was over the age of majority and under no legal disability.

8. The Note was clear and unambiguous on its face, did not refer to any collateral or security, or the happening of any future event.

9. The defendant failed to pay the Note according to its terms.

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a Summary Judgment as a matter of law against defendant.

2. A Judgment in this matter in favor of the plaintiff and against the defendant should be entered consistent with the foregoing Determinations of Fact.

3. The defendant's Counterclaim is barred by the statute of limitations and should be dismissed.

4. Plaintiff is entitled to his attorney's fees and costs in this matter.

Dated this 22 day of February, 1993.

191

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Determinations of Fact and Basis for Granting Summary Judgment, to the following, this 22 day of February, 1993:

Robert W. Hughes
Attorney for Plaintiff
7050 S. Union Park Avenue, Suite 420
P.O. Box 57005
Salt Lake City, Utah 84157-005

Frederick N. Green
Attorney for Defendant
10 Exchange Place, Suite 528
Salt Lake City, Utah 84111

TITLE: (✓ PARTIES PRESENT)

L.H. HANSEN,

COUNSEL: (✓ COUNSEL PRESENT)

: Robert W. Hughes

Plaintiff,

: Attorney for Plaintiff

vs.

: Frederick N. Green

WAYNE PARKER,

: Attorney for Defendant

Defendant.

:

CLERK

HON. TIMOTHY R. HANSON

JUDGE

REPORTER

DATE: 2/22/93

BAILIFF

The above-referenced matter comes to the Court's attention by way of a Request for Decision and Entry of Judgment filed on January 22, 1993 by the plaintiff. The Court has reviewed the Objection to the Findings of Fact and Conclusions of Law filed by the plaintiff, and has reviewed the defendant's Objection to the reasonableness of the plaintiff's requested attorney's fees. The Court has reviewed the Affidavit of Attorney's Fees, and examined the hours wherein reimbursement is sought in relation to the file, and has considered the other matters that should be considered in connection with determining an amount of attorney's fee.

The Court has redrafted the Findings of Fact and Conclusions of Law to show that they are Determinations of Fact and Basis for Granting Summary Judgment. Copies of the document that the Court has signed and entered are attached to this Minute Entry for counsel's files.

In relation to the request for attorney's fees, the Court is satisfied that the amount of attorney's fees sought is excessive in connection with the amount of the dispute between the parties, and is further not satisfied that the time expended was necessary in connection

County of Salt Lake - State of Utah

FILE NO. 910905500

TITLE: (✓ PARTIES PRESENT)

N. H. HANSEN,

COUNSEL:

(✓ COUNSEL PRESENT)

Plaintiff,

vs.

WAYNE PARKER,

Defendant.

CLERK

REPORTER

BAILIFF

HON. TIMOTHY R. HANSON

JUDGE

DATE:

with this matter. The Court has determined that a fair amount of attorney's fees in this matter will be \$3,000.00, and has inserted that amount in the Judgment.

No further Order with regard to the Objections to what were originally styled "Findings of Fact and Conclusions of Law," nor an Order in connection with the Court's determination on attorney's fees will be necessary, inasmuch as this Minute Entry will stand as the Court's Order in that regard.

151
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

Copies to:
Robert W. Hughes, Esq.
Frederick N. Green, Esq.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
DISTRICT COURT
Third Judicial District

N. H. HANSEN,	:	JUDGMENT
Plaintiff,	:	
vs.	:	CASE NO. 910905500
WAYNE PARKER,	:	
Defendant.	:	

FEB 22 1993

By JS SALT LAKE COUNTY
Deputy Clerk

This action came on for hearing pursuant to plaintiff's Motion for Summary Judgment before the Court, the Honorable Timothy R. Hanson presiding. The plaintiff was represented by his counsel of record, Robert W. Hughes, and the defendant was represented by his attorney, Julie Lund, of the law firm of Green & Berry. The parties having made argument to the Court, and the Court having reviewed the pleadings and the file of this matter, and being fully advised of the issues before the Court, enters this Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. The plaintiff is given Judgment against the defendant in the amount of \$8,844.88, plus interest thereon at the legal rate of interest.

2. Plaintiff is given Judgment against the defendant in the sum of \$99.00 for costs and expenses incurred by the plaintiff in this lawsuit.

3. The plaintiff is given Judgment against the defendant as and for attorney's fees, pursuant to the terms of the Promissory Note, which was the subject of the plaintiff's Complaint, in the amount of \$3,000.00.

4. The defendant's Counterclaim against the plaintiff is dismissed.

Dated this 22 day of February, 1993.

151
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment, to the following, this 22 day of February, 1993:

Robert W. Hughes
Attorney for Plaintiff
7050 S. Union Park Avenue, Suite 420
P.O. Box 57005
Salt Lake City, Utah 84157-005

Frederick N. Green
Attorney for Defendant
10 Exchange Place, Suite 528
Salt Lake City, Utah 84111

GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

N. H. HANSEN,

Plaintiff,

vs.

WAYNE PARKER,

Defendant.

AFFIDAVIT OF WAYNE PARKER

Civil No. 910905500 CV

Judge Timothy Hanson

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Wayne Parker, being first duly sworn upon his oath, deposes and states as follows:

1. That he is the Defendant in the above-entitled action and over eighteen years of age.

2. That he has personal knowledge of all the facts set forth herein and is fully competent to execute this Affidavit.

3. That in the fall of 1986, my co-employee, Don Parrish (the son-in-law of the Plaintiff), approached me with the idea of purchasing a diesel tractor from his father-in-law who resided in Tennessee.

4. That I was never informed that the truck belonged to someone other than Mr. Hansen and that he was acting as a broker.

EXHIBIT

5. That I discussed the condition of the vehicle with Mr. Hansen who represented to me that the tractor was "road worthy" and that he had just had its engine rebuilt as well as other major repair work.

6. That I did not personally inspect the vehicle before deciding to purchase it as it was in Tennessee, instead I relied upon the representations of the Plaintiff regarding its condition.

7. That I sent his son-in-law and another driver to pick up the vehicle in Tennessee and signed a promissory note in favor of Mr. Hansen for the value of the truck in the condition which had been represented to me.

8. That I would not have signed the note for \$12,700.00 had I known of the defective condition of the truck's engine, i.e., that there was a large hole in the block of the engine which had been patched and painted to conceal it.

9. That I received \$3,400.00 in September, 1987 from the Plaintiff as a loan for repairs to the truck which I was to pay back over time but I did not agree that said amount would be added to the principal amount of the Note and bear interest at 10%.


10. That as a direct result of the defective condition of the truck, I spent over \$18,000.00 on the truck in the first six months I owned it, including repairing the crank shaft and rebuilding the engine. In addition, I suffered other consequential damages related to loss of income from the truck

and a penalty incurred when the truck broke down carrying a load of merchandise.

10. That after making the above repairs to the truck, I sold it and paid the entire sales price of \$3,500.00 to Mr. Hansen. It was my belief that I had paid more than the vehicle was worth and that I had satisfied my obligation to Mr. Hansen.

DATED this 9th day of June, 1992.

Wayne M. Parker
WAYNE PARKER

1992 [SUBSCRIBED AND SWORN to before me this 9th day of June,
 JOANNE WASHER
5454 Spumier Road
Murray, Utah 84107
My Commission Expires
April 7, 1995
State of Utah

My Commission Expires:

April 7, 1995

Joanne Washer
Notary Public
Residing in Salt Lake County,
State of Utah

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

That she is employed in the offices of GREEN & BERRY,
attorneys for Defendant herein, that she served the attached
AFFIDAVIT OF WAYNE PARKER upon the following parties by placing a
true and correct copy thereof in an envelope addressed to:

and depositing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah, on the 10 day of June, 1992.

My Commission Expires:

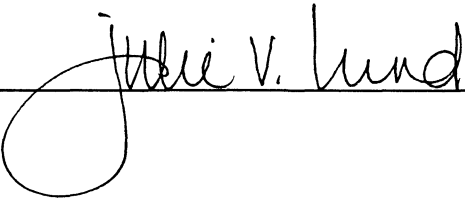
NOTED JUL 23 1963
JULIE BURTON
LEXINGTON, KY
P-223-91 Parker Aff. 10-1

CERTIFICATE OF MAILING

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

I, JULIE V. LUND, certify that on July 20, 1993 I served four copies of the attached BRIEF OF APPELLANT upon Robert W. Hughes, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Robert W. Hughes, Esq.
Attorney for Plaintiff
7050 South Union Park Avenue #420
P.O. Box 57005
Salt Lake City, Utah 84157-005

A handwritten signature in cursive script, reading "Julie V. Lund", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the beginning.